**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| GARY and ANNA-MARIE CUPPELS, et al., individually and on behalf of all others similarly situated, | : | |
| Plaintiffs, | : | C.A. No. S18C-06-009 CAK |
| v. | : | |
| MOUNTAIRE CORPORATION, et al., | : | |
| Defendants. | : | |
| L.H., by and through her guardian *ad litem*, TIFFANY HERNANDEZ, | : | |
| Movant. | : | |

**Submitted: May 8, 2023**
**Decided: May 9, 2023**

***Class Member's Motion to Amend Orders Granting Preliminary and Final Approval of Class Settlement***

***GRANTED IN PART.***

**MEMORANDUM OPINION AND ORDER**

Chase T. Brockstedt, Esquire, Phillip C. Federico, Esquire, *pro hac vice*, and Brent Ceryes, Esquire, *pro hac vice*, Baird Mandalas, Brockstedt, Federico & Cardea, LLC, 1413 Savannah Road, Suite 1, Lewes, Delaware 19958, Class Counsel.

F. Michael Parkowski, Esquire, Michael W, Teichman, Esquire, and Elio Battista, Jr., Esquire, Parkowski, Guerke & Swayze, P.A., 1105 North Market Street, 19th Floor, Wilmington, Delaware 19801, Counsel for Defendants.

Timothy K. Webster, Esquire. and Daniel J. Hay, Esquire, *pro hac vice*, Sidley Austin, LLP, 1501 K. Street, N.W. Washington, D.C. 20005, Counsel for Defendants.

Thomas C. Crumpler, Esquire and Raeann Warner, Esquire, Jacobs and Crumpler, P.A., 750 Shipyard Drive, Suite 200, Wilmington, Delaware 19801, Counsel for Movant.

I write this opinion the day after I held oral argument on Movant's Motion to Amend Orders Granting Preliminary and Final Approval of Class Settlement (the "Motion"). Typically, a case would simmer for a period before disposition. But this case is near its conclusion and time is critical. All Claimants in the Class have waited long enough.

Extraordinary cases require extraordinary action. A more negative view is the old saw that hard cases can make bad law. Ultimately, my job, our job, is to do justice. Our system is imperfect because the human beings who manage the system are imperfect. The very first rule of our rules of civil procedure, Delaware Superior Court Rule of Civil Procedure 1, provides in part:

> These Rules shall govern procedure in the Superior Court of the State of Delaware…. They shall be construed, administered, and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding.

We try to meet the "speedy and inexpensive" dictates, with middling success. The "just" dictate, in my view, overrides everything. I do not suggest that I or any judicial officer can simply ignore the dictates of other rules. I do suggest that a just resolution should be always on my mind.

This case involves multiple claims against one of Sussex County's most important industries: chicken processing. There are more chickens in Sussex

County than there are people.[1] The business provides jobs and feeds people. According to Plaintiffs, the Defendants in the course of their operations created toxic waste which caused property damage and personal injury to people in the Millsboro area. Defendants strenuously contested and vigorously defended against Plaintiffs' claims. I will not repeat any of the factual details of the litigation. The time constraint I place upon myself prevents a detailed recitation, and I refer to any of the many opinions I have written on various issues for those details.

Suffice it to say, I approved the formation of the Class for the pursuit of Plaintiffs' claims. After extensive litigation and negotiation, the parties reached a settlement agreement with a corpus of sixty-five million dollars. The parties worked hard and with diligence and professionalism to present to me a comprehensive agreement plan. The plan includes, *inter alia*, administrators to provide notice to and organize the Class, and a Claims Administrator, retired Judge Irma S. Raker, who formerly served on the Maryland Court of Appeals. Judge Raker came with impeccable credentials, and in my opinion everything she has done to date has justified her sterling reputation.

[1] The ratio is approximately 200:1. United Corporate Services, Inc., 2023.

The case proceeded through various stages and is nearing conclusion. It appears to me the parties and administrators have handled things professionally and well, and all can be proud of their efforts and the results.

Among her many duties, Judge Raker evaluated personal injury claims and determined the distribution of money to each Claimant. The plan of distribution allowed her to make initial awards, and to consider any appeals from the initial awards. Her decisions were final. Of course, this required her to always be conscious of how any individual award would affect the Class as a whole.

The settlement plan had advantages and disadvantages. It ended the litigation and created a very substantial settlement fund. It allowed each Claimant to present claims in a much more economical and less formal way. As a class action, it eliminated the need for each Claimant to prepare, and bear the expense, of individual liability proofs. But it is also fair to say that the class action lumped everyone together, making it impossible to say if any individual Claimant received maximum compensation.

I approved the settlement plan after conducting a fairness hearing. I was pleasantly surprised at how few objectors appeared at the hearing. Most objectors fell outside the parameters of the Class and were understandably disappointed. I approved the formation of the Class, and ultimately the settlement

plan. When one approves a settlement plan in cases like this, it is impossible to tell if enough is enough. The size of the settlement here was impressive, as was the size of the Class. Liability issues are also difficult to assess. Here, causation appeared to me to be a significant issue. In any event, after approval of the settlement plan the case moved to distribution. The settlement plan gave Claimants until January 2021 to opt out of the class. If a Claimant had done so, the Claimant had the theoretical right to pursue a case against Defendants on their own. I am informed by the parties thirty people opted out, but no individual cases are pending.

**L. H.**

One of the Claimants was L.H.[2] L.H.'s family lived near a field upon which Defendants spread waste sludge. Mountaire stopped using the field many years ago. Complications developed in L.H.'s mother's pregnancy and doctors delivered L.H. prematurely. She suffered profound injuries in the process and will be permanently disabled. Her conditions place significant burdens on her family, who, from all I can tell, handle them gracefully and lovingly. In the context of this litigation, if L.H.'s disabilities are traceable to any wrongful action of Defendants, her claims would be enormous. But there lies the rub of the Motion before me.

[2] She is a minor, so initials are used.

L.H. and her family members did not opt out of the Class. In February 2022, more than a year after the opt out period expired, L.H. and her family retained current counsel. Current counsel opined that L.H. should have opted out, and made their opinion known to Class Counsel in a letter dated March 11, 2022. The letter contained what I will euphemistically call pointed allegations of ethical violations and malpractice. Of most significance to me, the letter also contained an assertion that counsel on behalf of L.H. would be seeking relief from the opt out date deadline. The letter ended with the following:

> In candor, the Heranandez family may also seek leave to opt out of the class and proceed directly against Mountaire for their child's case, as well as anyone else in their family who is part of the class.[3]

Had L.H.'s counsel filed a motion at that time, and before the Claims Administrator distributed substantial portions of money to certain class members, I would have viewed it more favorably. But counsel elected not to file such a motion, and availed L.H. and her family to the class distribution process. L.H.'s current counsel at the hearing this week explained to me they felt the process was fairly designed, and they scrambled to put together L.H.'s claim.

[3] See D.I. 662, Ex. E.

The process gave the Claims Administrator sole discretion to evaluate claims, make awards, and also evaluate any appeals from her decision. She was the ultimate decision maker. The settling parties, including Class Counsel and Defendants, designed this process, and L.H.'s current counsel accepted it when submitting L.H.'s claims and not seeking a late opt out. Of course, I also approved it.

Now to get to the reason for the hearing, and the issues I must resolve. Judge Raker determined that sufficient proof of causation was lacking and placed L.H. in the most modest distribution category. That category awards a Claimant $2,500.00. L.H.'s counsel categorizes the award as "insulting." If one were to assume causation between L.H.'s disabilities and Mountaire's conduct, counsel's characterization would be correct. It is patently clear that no one intended the award to be insulting, but a reflection of an evaluation of causation. As was her right, L.H. appealed the award. After further evaluation, including consultation with an independent physician in the field of maternal/fetal medical obstetrics/GYN and Public Health,[4] the Claims Administrator denied L.H.'s appeal.

[4] See Letter of Special Master/Claims Administrator dated April 26, 2023, D.I. 666.

## THE MOTION

In response to the denial of L.H.'s appeal, her counsel filed the Motion. The Motion is far reaching and would disrupt the entire class. Movant included in the claims for relief a request to stop any further disbursements to other Class members.

Defendants and Class Counsel filed written responses to the motion, and on May 8, 2023, I held a hearing to review it.

The Motion explains in graphic detail the medical issues plaguing L.H.. It also gives information concerning the issue of causation. At the hearing, L.H.'s counsel further articulated that the settlement plan required payment to claimants whose injuries and losses were "associated with" the claimed toxic exposure, differentiating "associated with" from "proximate cause". Class Counsel and Defendants' counsel disputed this characterization, telling me they deliberately used the language because they thought it would be easier for Class members to understand than "legalese." In her letter explaining L.H.'s award, the Claims Administrator explained that the settlement process provides:

> The Claims Adjudicator(s) will consider each of the damages criteria for each claimant…. The Claims Adjudicators will not award damages for claims unrelated to the alleged contamination at issue in this Action.[5]

Much of what L.H.'s counsel argued was grounded in Superior Court Civil Rule 60(b), which governs relief from judgment. Class Counsel and Defendants raised numerous technical legal issues with this argument. Not surprisingly, at the hearing, L.H.'s counsel backed away from its reliance on Rule 60(b), as well as the request to upset the class settlement.

Time does not allow me to devote to a full analysis of the Rule 60(b) argument. In my view, the compelling response is that the delay between the time counsel for L.H. became aware of the issue (at least as early as March 2022), and the filing of the motion a year later precludes Rule 60(b) relief.[6] In addition and despite the misgivings, counsel for L.H. decided to move forward within the confines of the class process. Counsel candidly admitted at the hearing he thought L.H.'s claims could be appropriately processed under the designed methodology. Any challenge to it has, for me, been waived.

At the hearing L.H.'s counsel made a much more modest proposal. He suggested that given the extraordinary circumstances, as well as the provision

[5] Id.

[6] *Sens Meck., Inc. v. Dewey Beach Enters., Inc.* 2015 WL 5157210, at *3-4 (Del. Super. June 19, 2015) (holding a two-month delay to be fatal).

in the settlement plan which retains my jurisdiction to administer to class, I should erect an additional process for L.H., and the approximately twenty Class members for whom the Claims Administrator denied appeals. Counsel also specifically withdrew his request to stop currently approved distributions.[7]

## DEFENDANTS' AND CLASS COUNSEL'S VIEWS

Defendants, not surprisingly, were most interested in the original claim to allow L.H. to opt out. While the original agreement allowed for opt outs, and Defendants always knew this could happen, two years after the opt out date they felt they were safe. They did not want to face a potentially large claim from L.H. They made forceful arguments against any application of Rule 60(b). They also argued generally that to disrupt the Class now would be unfair, and violate the settlement agreement that they and Class Counsel had worked so hard and diligently to produce. This argument was somewhat patronizing and less persuasive to me.

Class Counsel echoed Defendants' arguments. They carefully stayed out of any discussion of arguing for or against any individual Class member claims.

[7] This all seemed more palatable when L.H.'s counsel learned that seventeen million dollars still remained in the funds to be allocated.

That leaves me with the question of what to do. Counsel for L.H. suggest that, under Superior Court Civil Rule 133, I could hold a hearing to determine the fairness to L.H.. That seems unworkable to me. I have always viewed Rule 133 as an up or down vote on a settlement. I see no mechanism for evaluating the claim, reassessing it, and determining how that would affect the remainder of the Class.

But I do think L.H.'s case deserves a third look. At the beginning of this too long opus, I talked about justice and fairness.[8] I want to ensure that L.H. is given that opportunity. I am in no way criticizing the work of the Claims Administrator. Her work has been diligent, professional, and splendid. The process has been difficult, but fair. There are many considerations and concerns with which she has had to deal. She did so with grace and spectacular success. But I am asking her to review L.H.'s case again.

[8] This brings to mind what maybe an apophrocal law school story brought to my attention recently. On the first day of the first year of law school a professor asked what was the purpose of law. As law professors are wont to do he called upon a student near the back to answer. When she had barely said a few words he screamed at her she was wrong, would never be a lawyer, and told her to leave the classroom. Horrified, the student left. He again asked the class to say the purpose of law. Finally, one student mumbled "justice." The professor then asked if what he did expelling the student was justice. The answer was a resounding "No." The professor went on to explain the purpose of law was not just justice, but the application of justice. It was their job as lawyers to apply justice. They should have stood up for their fellow unjustly treated student. I can only hope she was a "plant." Here I can only hope all Class members are treated justly.

## THE PROCESS GOING FORWARD

1. The relief is only for L.H. only.

I am limiting the relief I am granting to L.H.'s claims. I recognize that this may create some unfairness to those other Claimants whose appeals were denied. I do so for several reasons. First, time has passed, and they have not raised any issues as L.H. has. There has to be finality to preserve the entire Class. I address only L.H.

2. Further proceedings.

I will ask L.H.'s counsel and the Claims Administrator to meet and confer on a process for revaluation. I will leave the details to them, but would require at least a period of sixty (60) days to allow counsel for L.H. to submit any additional information concerning the claim. I will also allow counsel for L.H. to talk with the expert identified by the Claims Administrator[9] to discuss the case and, if counsel decides to seek a written report from the expert, to submit to the Claims Administrator. All this will be done at L.H.'s expense. After the submissions are made, the Claims Administrator will issue her final decision as to L.H.'s claims, and then complete her work for the entire class.

[9] I am assume the expert will agree to this. If not counsel for L.H. may seek alternative relief.

None of this is to suggest what the particular resolution of L.H.'s claims should be or that the Claims Administrator got it wrong in her earlier decision. On the contrary, in the L.H. decision, and the handling of other claims, the Claims Administrator has performed admirably.

If counsel for L.H. and the Claims Administrator can agree on any other procedures for the assessment of L.H.'s claim they are free to do so. If a disagreement arises as to the process, the determination of the Claims Administrator controls.

In this opinion I do not address the pointed allegations made by counsel for L.H. regarding Class Counsel. Those allegations are outside my purview.

**IT IS SO ORDERED.**

/s/ Craig A. Karsnitz
**Craig A. Karsnitz**